

No. 45202-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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BEATRIX RUFFIER and ROBERT RUFFIER,

Appellants,

v.

BRETT HAYFIELD and KATHY DAVIS-HAYFIELD,

Respondents/Cross Appellants,

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**CROSS APPELLANTS' OPENING BRIEF**

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Michael M.K. Hemphill  
WSBA No. 27340  
Attorneys for Respondents/Cross Appellants,

ROBERTS JOHNS & HEMPHILL, PLLC  
7525 Pioneer Way, Suite 202  
Gig Harbor, Washington 98335  
Telephone No. (253) 858-8606  
Facsimile No. (253) 858-8646

 ORIGINAL

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I.  
**HAYFIELDS' ASSIGNMENTS OF ERROR**

The Respondents, Cross-Appellants, Brett Hayfield and Kathy Davis-Hayfield ("Hayfield") assign error to the Trial Court's Amended Findings of Fact and Conclusions of Law as follows:

Conclusion of Law No. 8.

A copy of the Trial Court's Amended Findings of Fact and Conclusions of Law is attached as Appendix A.

The Hayfields also assign error to the Amended Judgment and Order Dated July 26, 2013. A copy of the Amended Judgment and Order is attached as Appendix B.

II.  
**ISSUES PERTAINING TO THE HAYFIELDS' ASSIGNMENTS OF ERROR**

1. Did the Trial Court err in its decision that the Hayfields were not entitled to recover their reasonable attorneys' fees pursuant to RCW 19.122.040(4) when it found that Appellant Robert Ruffier breached his duty to exercise reasonable care to avoid damaging the drain pipe at issue, directly resulting in the Hayfields suffering damages in the amount of \$95,578.74?

**III.**  
**STATEMENT OF THE CASE**

**1. Overview**

The Hayfields and Beatrix Ruffier and Robert Ruffier ("Ruffier") are neighbors. For decades, the drains that surround the foundation of the Hayfields' house have collected ground water and discharged that water through a drain pipe that runs underground from the Hayfields' house and across the Ruffiers' property. In early February 2011, Mr. Ruffier decided to use a backhoe to remove a tree stump near the boundary line separating his property from the Hayfields' property. Mr. Ruffier knew the drain pipe was underground in that area, but did not provide the notice required under Chapter 19.122 RCW before engaging in that excavation, nor did he attempt to confirm the location of the drain pipe. Instead, he just went ahead and started excavating. As a result, he crushed the drain pipe, causing water to back up the drain pipe and flood into the Hayfields' basement damaging the Hayfields' house and personal property.

Following trial, the Trial Court entered Amended Findings of Fact and Conclusions of Law in which it determined that Mr. Ruffier breached his duty to exercise reasonable care to avoid damaging

the drain pipe and awarded the Hayfields damages in the amount of \$95,578.74. CP 31 - Conclusion of Law No. 7. However, the Court concluded that the Hayfields were not entitled to recover their reasonable attorneys' fees pursuant to RCW 19.122.040(4). CP 32 - Conclusion of Law No. 8. The Hayfields appeal that conclusion.

**2. Statement of Facts.<sup>1</sup>**

The Hayfields have lived at 6209 Reid Road, Gig Harbor, Washington, 98335, since 2004. The Ruffiers have lived at 6109 Reid Road, Gig Harbor, WA 98335 since 1989. The Ruffier property is adjacent and immediately south of the Hayfields' property. CP 22 - Finding of Fact No. 1.

**a. The Flooding**

In early February 2011, the Hayfields noticed water accumulating in their basement. The basement had not leaked at any time during their ownership of the house, and they were unaware of any previous water infiltration issues. The water appeared to be originating from under the laundry washer and dryer units that were up against the basement's south wall. The Hayfields inspected the units, but found that they were not leaking.

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<sup>1</sup> The facts provided below are taken directly from the Trial Court's Amended Findings of Fact and Conclusions of Law.

They vacuumed up the water and hoped that it was an isolated incident. CP 22 - Finding of Fact No. 2.

The next day the Hayfields noticed more water accumulating in the same area of their basement. Again they were unable to determine the source of the water. Soon the water in the basement increased to several inches in depth. The Hayfields had begun pumping water out of a basement window using electric pumps, but the pumps could not keep up with the amount of water infiltrating the basement. CP 22-23 - Finding of Fact No. 3.

On February 4, 2011, at the same time the water infiltrated the Hayfield's basement, Mr. Ruffier used a rented backhoe to dig out a two-foot diameter tree stump on his property. Using the backhoe, Mr. Ruffier excavated a trench approximately three feet deep around the stump and then used the bucket of the backhoe to wiggle the stump out of the ground. He then back-filled the three-foot deep hole with dirt, and compacted it by driving over it with the backhoe. Mr. Ruffier made no effort whatsoever to identify any utilities before performing his excavation work. Mr Ruffier did not provide prior notice of the work he performed to the Hayfields or to anyone else, including the 811 one-number call service. The

Hayfields saw Mr. Ruffier performing his excavation work in early February 2011. CP 23 - Finding of Fact No. 4.

Over the next three weeks, the Hayfields contacted a series of plumbers, leak detection contractors, and even Pierce County officials to investigate the flooding. No one could identify the source of the water. Several inches of water remained in the basement. CP 23 - Finding of Fact No. 5.

On or about March 10, 2011, the Hayfields woke up to find that approximately three feet of water had accumulated in their basement overnight. The damage caused by the water was extensive. CP 23-24 - Finding of Fact No. 6.

The Hayfields called Robison Plumbing to identify the source of the water. On March 10, 2011, Tom Bozeman of Robison Plumbing investigated the Hayfields' basement. He quickly concluded that the water was not coming from the plumbing inside the Hayfields' house, and was not sewage from their septic system. His investigation soon revealed a floor drain behind the Hayfields' washer and dryer units next to the basement south wall. The drain was not taking water. He knew from experience that houses such as the Hayfields' typically had storm drain systems that are comprised of a series of footing drains surrounding the foundation



of the house that relieve hydrostatic pressure and otherwise convey ground-water away from the foundation. Those systems also include a floor drain in the basement tied into those footing drains. Mr. Bozeman suspected that the flooding was due to an obstruction in the Hayfields' foundation drain system that was causing water to back up through the floor drain and into the basement. CP 24 - Finding of Fact No. 7.

Through a series of investigations Mr. Bozeman confirmed the existence of the Hayfields' foundation drain system and that the floor drain connects to that system. He further confirmed that the system connects to an underground drain pipe that runs from the Hayfields' house and across the boundary line onto the Ruffiers' property. A few feet after crossing the boundary line, the pipe turns eastward and continues to run parallel to the boundary line until exiting the east bank of the Ruffiers' property overlooking the Narrows, where it terminates. CP 25-28 - Findings of Fact Nos. 8 – 15.

Based on Mr. Bozeman's observations, and testimony at trial, the Trial Court found that the drain pipe was damaged and completely obstructed during the stump removal work Mr. Ruffier performed on or about February 4, 2011, which then caused the

water that drains through the drain pipe to back up through the Hayfields' basement drain and into the Hayfields' basement. CP 28 - Finding of Fact No. 16.

**b. The Ruffiers' Knowledge of the Drain Pipe**

Esther Davies owned the Hayfields' property from 1971 to 1999. In 1997 Ms. Davies and the Ruffiers were in a lawsuit with each other relating to the boundary line shared by their respective properties. The lawsuit settled in December 1997, when Ms. Davies and the Ruffiers agreed to a boundary line adjustment accommodating certain improvements to Ms. Davies' property installed before she acquired it that crossed the boundary line. CP 28 - Finding of Fact No. 17.

Beginning in March 1998, Ms. Davies, the Ruffiers, and their respective representatives, exchanged a series of letters demonstrating that the Ruffiers not only knew the drain pipe existed in 1998, but also that it crossed under the Ruffiers' property and provided drainage from the Hayfield property. CP 28-29 - Finding of Fact No. 18.

By no later than August 1999, the Rufflers knew the drain pipe existed, that it crossed the boundary line their property shares with the Hayfields' property, that Ms. Davies was using it for

drainage, and that it had provided drainage for the Davies' (Hayfields') property for more than 50 years. Further, a survey of the boundary line performed by Apex in 2009 gave Mr. Ruffier specific knowledge by that year that the drain pipe did indeed cross the property boundary line, and it runs underneath the Ruffiers' property near the boundary. CP 19 - Finding of Fact No. 19.

#### IV. ARGUMENT

**1. Chapter 19.122 RCW Imposes Two Independent Duties Prior to Digging– The Duty to Give Notice and the Duty to Exercise Reasonable Care.**

Chapter 19.122 RCW (the “Act”) sets forth a series of obligations for excavators that encompass each step of an excavation.<sup>2</sup> The Act requires specific notices be given before excavation can proceed and specifies the duties that must be met during the excavation process to serve the purpose of “protecting and repairing damage to existing underground facilities<sup>3</sup>, and

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<sup>2</sup> The Act was extensively revised effective January 1, 2013; however, none of the revisions are relevant to the analysis herein. All references to the Act are to sections in effect in February and March 2011, when Mr. Ruffier performed his excavation work, and copies of those sections are attached as Appendix C.

<sup>3</sup> “Underground facility” is defined as “any item buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances and including but not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, and those parts of poles or anchors below ground.” RCW 19.122.020(22).

protecting the public health and safety from interruption in utility services caused by damage to existing underground facilities.” RCW 19.122.010.

The Act specifically provides that before commencing an excavation, “the excavator shall provide notice of the scheduled commencement of excavation to all owners of underground facilities through a one-number locator services.” RCW 19.122.030(1). In “cases in which an excavator fails to notify known underground facility owners or the one-number locator service, any damage to the underground facility shall be deemed willful and malicious[.]” RCW 19.122.070(2) (emphasis added).

In addition to imposing upon excavators the obligation to provide notice, the Act further imposes upon excavators a general duty that an “excavator shall use reasonable care to avoid damaging underground facilities.” RCW 19.122.040(2). As explained below, once the Trial Court determined that Mr. Ruffier breached his duty to use reasonable care, the Court was required to award to the Hayfields their reasonable attorneys’ fees under RCW 19.122.040(4).

**2. The Trial Court Did Not Have the Discretion to Deny Awarding the Hayfields Their Reasonable Attorneys' Fees – the Award is Mandatory.**

The Act provides that if an underground facility is damaged “and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation shall be liable for any damages.” RCW 19.122.040(3).

The Act also provides that in any action brought under the statute, “the prevailing party is entitled to reasonable attorneys’ fees.” RCW 19.122.040(4) (emphasis added). In this case, the Trial Court erred in not awarding to the Hayfields their attorneys’ fees.

Generally, this Court applies a two-part review to awards or denials of attorneys’ fees: (1) it reviews de novo whether there is a legal basis for awarding attorneys’ fees by statute, under contract, or in equity, and (2) it reviews a discretionary decision to award or deny attorneys’ fees and the reasonableness of any attorneys’ fee award for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

Here, the decision whether or not to award the Hayfields their reasonable attorneys’ fees was not within the Trial Court’s discretion. The plain language of the statute in this regard is

mandatory in nature, not permissive. Specifically, the Act provides that a prevailing party "is" entitled to an award of its reasonable attorneys' fees. RCW 19.122.040(4). Thus, although a court may exercise its discretion in setting the amount of an attorneys' fees award to a prevailing party, this discretion does not extend to allow the complete denial of attorneys' fees. See, e.g., *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987) (Trial court does not have discretion to deny attorneys' fees where statute providing for fees contains mandatory language providing that the prevailing party "shall be entitled to reasonable attorneys fees.") (Emphasis added).

Here, the Trial Court made the following findings and conclusions which satisfy all of the elements necessary for liability to arise under the Act: (1) Mr. Ruffier was an "excavator" as defined by RCW 19.122.020(6) when he performed stump removal work on his property in February 2011 (CP 31 - Conclusion of Law No. 1); (2) this work was an "excavation" as defined by RCW 19.122.020(4) (CP 31 - Conclusion of Law No. 2); (3) the drain pipe that is the subject of this lawsuit was an "underground facility" as defined by RCW 19.122.020(22) (CP 31- Conclusion of Law No. 3); (4) Mr. Ruffier did not provide prior notice of his work to the

Hayfields or to anyone else, including calling the 811 one-number call service (CP 23 - Finding of Fact No. 4); (5) Mr. Ruffier breached his duty to exercise reasonable care to avoid damaging the drain pipe because he failed to take any steps to identify the location of the drain pipe before performing his excavation activity in an area he knew the drain pipe was located (CP 31 - Conclusion of Law No. 6); (6) the resulting damage to the pipe and the flooding of the Hayfields' basement was a foreseeable consequence of Mr. Ruffier's actions (CP 31 - Conclusion of Law No. 5); and (7) the Hayfields were entitled to an affirmative judgment of their actual damages in the amount of \$95,578.74 (CP 31 - Conclusion of Law No. 7).

The Hayfields are the prevailing party as a result of the judgment awarded in their favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669, 681 (1997) ("In general, a prevailing party is one who receives an affirmative judgment in his or her favor.") Accordingly, the Hayfields are entitled to an award of their reasonable attorneys' fees under RCW 19.122.040(4).

The Trial Court determined that the Hayfields were not entitled to an award of attorneys' fees because notice to them of the excavation and/or calls to the "811" service would not have

prevented the damage that occurred. CP 32 – Conclusion of Law No. 8. However, the Trial Court ignored that part of the Act that imposed upon the Ruffiers a separate and distinct duty to “exercise reasonable care to avoid damaging underground facilities,” which duty the Court expressly determined the Ruffiers had breached. See RCW 19.122.040(2).

In reaching its conclusion, the Court may have decided an excavator’s duty to exercise reasonable care is met simply by calling the 811 number or otherwise providing notice. But this interpretation of the Act is incorrect. If the Legislature had intended for notice or calling 811 to be enough to meet the duty to exercise reasonable care, it would have either ensured that the Act said that or it would never have included the language “[a]n excavator shall use reasonable care to avoid damaging underground facilities” in the Act. RCW 19.122.040(2). Meaning must be given to the plain language of the statute. *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn. 2d 1, 9-10, 43 P.3d 4 (2002) (“The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”) Here, the Act’s clear and unambiguous



language indicates that the Legislature intended excavators to provide the required notice of their excavation activities and to exercise reasonable care to avoid damaging underground facilities while carrying out those activities.

In some cases, notice might perhaps be evidence of reasonable care, and perhaps Mr. Ruffier would have met this duty had he no reason to know of the existence and location of the pipe, and in fact called the 811 service or otherwise provide the proper notice (and he did neither). But in this case, Mr. Ruffier did know that the drain pipe existed. He knew it crossed the boundary line separating his property from the Hayfields' property. He knew it ran underground parallel to that boundary line. As the Trial Court specifically found, the duty to take action to prevent the excavation or attempt to locate the pipe "fell on Defendant Ruffiers based on their superior knowledge from the exchange with Davies in the late 1990's." CP 29 - Finding of Fact No. 20.

The intent of the Act is to "assign responsibility for locating and keeping accurate records of utility locations, protecting and repairing damage to existing underground facilities, and protecting the public health and safety from interruption in utility services caused by damage to existing underground utility facilities." RCW

19.122.010. This purpose is not served by shielding from liability landowners who damage underground drainage pipes that they know exist simply because they called (or in this case, failed to call) the 811 number, nor does the Act support such a result.

Mr. Ruffier did not just fail to call the 811 service – he did not make the slightest effort to locate the drain pipe. Accordingly, the Trial Court held Mr. Ruffier failed to exercise reasonable care in performing his excavation activities. CP 31 - Conclusion of Law No. 6. This breached the duty imposed by RCW 19.122.040(2), and led directly to the damages suffered by the Hayfields. The Ruffiers were therefore liable under RCW 19.122.040(3) for “any damage” suffered by the Hayfields. As the prevailing party, the Hayfields are entitled to an award of their reasonable attorneys’ fees under RCW 19.122.040(4). The trial court did not have the discretion to deny the Hayfields an award of their reasonable attorneys’ fees, and it erred by doing so.

**3. The Hayfields are Entitled To An Award of their Attorneys’ Fees Incurred On Appeal.**

Pursuant to RAP 18.1, the Hayfields request their attorneys’ fees on appeal be awarded pursuant to RCW 19.122.040(4), which

provides for an award of reasonable attorneys' fees to the prevailing party in any action brought under the Act.

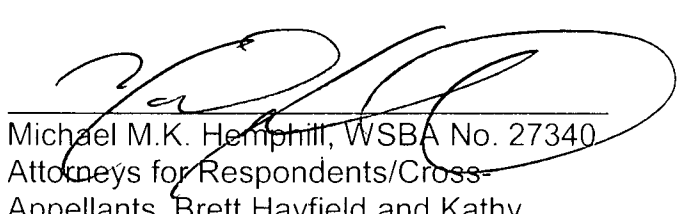
**V.**  
**CONCLUSION**

For the foregoing reasons, this Court should reverse the Trial Court's decision and award to the Hayfields their reasonable attorneys' fees pursuant to RCW 19.122.040(4).

Dated: May 6<sup>th</sup>, 2014.

Respectfully submitted

ROBERTS JOHNS & HEMPHILL, PLLC



Michael M.K. Hemphill, WSBA No. 27340  
Attorneys for Respondents/Cross-  
Appellants, Brett Hayfield and Kathy  
Davis-Hayfield

## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2014, I caused to be served the foregoing CROSS-APPELLANTS' OPENING BRIEF on the following individuals in the manner indicated:

Jennifer Ann Wing  
Law Office of Jennifer A. Wing PLLC  
615 Commerce St., Suite 205  
Tacoma, WA 98402-4605

(X) Via Hand Delivery (ABC Legal Messengers)

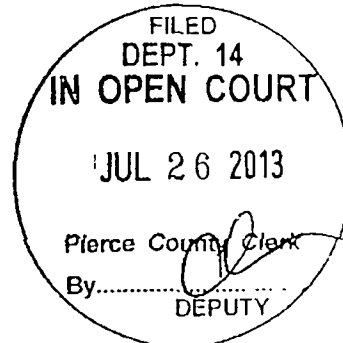
Gregory S. Worden  
Michael K. Rhodes  
Lewis Brisbois Bisgaard & Smith LLP  
2101 4<sup>th</sup> Ave., Suite 700  
Seattle, WA 98121-2393

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 6th day of May, 2014, at Gig Harbor, Washington.

  
KRISTINE R. PYLE

# APPENDIX A



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

BRETT HAYFIELD and KATHY DAVIS-  
HAYFIELD, husband and wife,

Plaintiffs,

vs.

BEATRIX RUFFIER and ROBERT  
RUFIER, husband and wife,

Defendants.

NO. 11-2-15350-4

AMENDED FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW

THIS MATTER having come before the Court for trial commencing on the 22<sup>nd</sup> day of April, 2013, before the Honorable Susan K. Serko, the Plaintiffs Brett Hayfield and Kathy Davis-Hayfield, husband and wife ("Hayfield") appearing by and through their attorney, Michael M. K. Hemphill, of Roberts, Johns & Hemphill, PLLC, and the Defendants, Beatrix Ruttier and Robert Ruttier, husband and wife ("Ruttier") appearing by and through their attorney, David J. Wieck, of Wieck Schwanz, PLLC.

AMENDED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
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ROBERTS JOHNS & HEMPHILL, PLLC  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646

1  
2 The Court heard the testimony of the parties' witnesses and admitted  
3 exhibits. Presentation of evidence and argument concluded on May 9, 2013.  
4 The Court having further reviewed the pleadings submitted by both parties  
5 and being in all things advised; now, therefore, the Court makes the following

6  
7 **FINDINGS OF FACT**

8 1. Plaintiffs Hayfield have lived at 6209 Reid Road, Gig Harbor,  
9 Washington, 98335, since 2004. Defendants Ruffier have lived at 6109 Reid  
10 Road, Gig Harbor, WA 98335 since 1989. The Ruffier property is adjacent  
11 and immediately south of the Hayfields' property.

12 2. In early February 2011, the Hayfields noticed water  
13 accumulating in their basement. The basement had not leaked at any time  
14 during their ownership of the house, and they were unaware of any previous  
15 water infiltration issues. The water appeared to be originating from under the  
16 laundry washer and dryer units that were up against the basement's south  
17 wall. The Hayfields inspected the units, but found that they were not leaking.  
18 They vacuumed up the water with a Shop-Vac and hoped that it was an  
19 isolated incident.  
20

21  
22 3. The next day the Hayfields noticed more water accumulating in  
23 the same area of their basement. Again they were unable to determine the  
24 source of the water. Soon the water in the basement increased to several  
25

1  
2 Inches In depth. The Hayfields had begun pumping water out of a basement  
3 window using electric pumps, but the pumps could not keep up with the  
4 amount of water infiltrating the basement.

5       4. On February 4, 2011, at the same time the water infiltrated the  
6 Hayfield basement, Mr. Ruffier used a rented backhoe to dig out a two-foot  
7 diameter tree stump on his property. Using the backhoe, Mr. Ruffier  
8 excavated a trench approximately three feet deep around the stump and then  
9 used the bucket of the backhoe to wiggle the stump out of the ground. He  
10 then back-filled the three-foot deep hole with dirt, and compacted it by driving  
11 over it with the backhoe. Mr. Ruffier made no effort whatsoever to identify any  
12 utilities before performing his excavation work. Mr Ruffier did not provide prior  
13 notice of the work he performed to the Hayfields or to anyone else, including  
14 the 811 one-number call service. The Hayfields saw Mr. Ruffier performing  
15 his excavation work in early February 2011.

16  
17  
18       5. Over the next three weeks, the Hayfields contacted a series of  
19 plumbers, leak detection contractors, and even Pierce County officials to  
20 investigate the flooding. No one could identify the source of the water.  
21 Several inches of water remained in the basement.

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23       6. On or about March 10, 2011, the Hayfields woke up to find that  
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1  
2 approximately three feet of water had accumulated in their basement  
3 overnight. The damage caused by the water was extensive. The Hayfields  
4 immediately set about doing what they could to salvage what was not  
5 completely destroyed. The pumps still could not keep up with the amount of  
6 water entering the basement. And the source of the water was still unknown.  
7

8 7. The Hayfields called Robison Plumbing to identify the source of  
9 the water. On March 10, 2011, Tom Bozeman of Robison Plumbing  
10 investigated the Hayfields' basement. He quickly concluded that the water  
11 was not coming from the plumbing inside the Hayfields' house, and was not  
12 sewage from their septic system. His investigation soon revealed a floor drain  
13 behind the Hayfields' washer and dryer units next to the basement south wall  
14 The drain was not taking water. He knew from experience that houses such  
15 as the Hayfields' typically had storm drain systems that are comprised of a  
16 series of footing drains surrounding the foundation of the house that relieve  
17 hydrostatic pressure and otherwise convey ground-water away from the  
18 foundation. Those systems also include a floor drain in the basement tied into  
19 those footing drains. Mr. Bozeman suspected that the flooding was due to an  
20 obstruction in the Hayfields' foundation drain system that was causing water  
21 to back up through the floor drain and into the basement.  
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1  
2 8. The small size of the floor drain made it a poor access point to  
3 insert a plumbing snake or other cabling. Mr. Bozeman searched outside for  
4 an alternative access point to the drain system. He found an old storm water  
5 conductor drain next to the South side of the house that used to be connected  
6 to the downspouts servicing the Hayfields' roof gutters. The conductor drain  
7 ran vertically down into the ground. In older houses such as the Hayfields',  
8 roof gutters and downspouts were often tied into foundation drain systems,  
9 and Mr. Bozeman suspected this conductor drain was connected to the  
10 Hayfields' foundation drain system. He saw water in the pipe when he looked  
11 down into it, which he confirmed was at the same level as the water in the  
12 basement. This was a sign that the water in the conductor drain and the  
13 water in the basement was related, and that the conductor drain is indeed  
14 connected to the foundation drain system.  
15

16  
17 9. Mr. Bozeman ran a plumbing snake down the conductor pipe  
18 and identified a drain pipe running from the Hayfields' foundation drain system  
19 towards the Ruffiers' property. After extending the snake approximately 70  
20 feet from the conductor pipe, Mr Bozeman encountered an obstruction in the  
21 drain pipe and the snake would not continue. He walked around the property  
22 to see if there was anything visible at the surface that might reveal what was  
23 causing the problem. He saw nothing obvious on the Hayfields' property.  
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1  
2 10. Mr. Bozeman then looked over the fence along the Hayfields'  
3 south property line and into the Ruffiers' property. He saw signs that  
4 somebody had recently dug out some tree stumps a few feet from the fence  
5 and in the approximate area of the obstruction.

6  
7 11. Mr. Bozeman attached a locator to the end of the snake and ran  
8 it down the drain pipe again to the obstruction. He confirmed that the  
9 obstruction was in the same location where Mr. Ruttier had -removed the  
10 stump in early February, 2011. The Hayfields had seen Mr. Ruttier  
11 performing excavation work with a backhoe in early February 2011, at the  
12 *same time they first noticed the flooding in their basement.* Mr. Bozeman  
13 suggested to the Hayfields that he run a camera down the drain line to  
14 confirm whether the stump removal work caused the obstruction in the drain  
15 pipe. The Hayfields agreed, and scheduled Mr. Bozeman to return on March  
16 17, 2011.

17  
18 12. Prior to Bozeman's return, Mr. Ruffier used his backhoe to dig  
19 out a large hole where he had removed the stump on February 4, 2011. He  
20 uncovered the Hayfields' crushed drain pipe. Water immediately entered the  
21 hole. He cleared out the pipe, allowing the water to exit the hole

22  
23 13 Water immediately drained out of the Hayfields' basement. By  
24 the time Mr. Bozeman returned to the Hayfields' residence on March 17,

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2 2011, the water was gone. Mr. Bozeman ran a camera line down the drain  
3 pipe to where he had previously encountered the obstruction with the snake.  
4 Instead of encountering the obstruction, the camera encountered daylight.  
5 Mr. Bozeman walked over to where he could see the location where the  
6 obstruction had been and saw the hole Mr. Ruffier had dug, which was now  
7 covered with a tarp. Water was flowing freely from the drain pipe into the  
8 hole.  
9

10 14. Using the camera in conjunction with his locator, Mr. Bozeman  
11 confirmed that the drain pipe runs in a southerly direction from the Hayfields'  
12 house for approximately six feet and then crosses the boundary line onto the  
13 Ruffiers' property. A few feet after crossing the boundary line, the pipe turns  
14 eastward. The drain pipe continues to run parallel to the boundary line until it  
15 reaches the hole Mr. Ruffier dug. The pipe picks up again on the opposite  
16 side of the hole, where it continues on the same easterly course parallel to the  
17 boundary line until exiting the east bank of the Ruffiers' property overlooking  
18 the Narrows, where it terminates. Mr. Ruffier installed a piece of PVC pipe in  
19 the hole to bridge the gap between the broken ends of the drain pipe, allowing  
20 the water to flow freely.  
21  
22

23 15. Mr. Bozeman used his camera to confirm with his own eyes that  
24 Mr. Hayfields' foundation drains connect to the drain pipe. He confirmed that  
25

1  
2 the floor drain in the Hayfields' basement connects to the foundation drain  
3 system by pouring dye into the drain and watched that dye come out of the  
4 end of the drain pipe in the hole Mr. Ruffier dug.

5 16. Based on Mr. Bozeman's observations, and testimony at trial,  
6 Plaintiff proved that the drain pipe was damaged and completely obstructed  
7 during the stump removal work Mr. Ruffier performed on or about February 4,  
8 2011, which then caused the water that drains through the drain pipe to back  
9 up through the Hayfields' basement drain and into the Hayfields' basement.  
10 The Hayfields' basement has not flooded and has been completely dry since  
11 the water drained out of it in March 2011.  
12

13 17. Esther Davies owned the Hayfields' property from 1971 to 1999.  
14 In 1997 Ms. Davies and the Ruffiers were in a lawsuit with each other relating  
15 to the boundary line shared by their respective properties. The lawsuit settled  
16 in December 1997, when Ms. Davies and the Ruffiers agreed to a boundary  
17 line adjustment accommodating certain improvements to Ms. Davies' property  
18 installed before she acquired it that crossed the boundary line.  
19

20 18. Beginning in March 1998, Ms. Davies, the Ruffiers, and their  
21 respective representatives, exchanged a series of letters demonstrating that  
22 the Ruffiers not only knew the drain pipe existed in 1998, but also that it  
23  
24  
25

1  
2 crossed under the Ruffiers' property and provided drainage from the Hayfield  
3 property.

4 19. By no later than August 1999, the Rufflers knew the drain pipe  
5 existed, that it crossed the boundary line their property shares with the  
6 Hayfields' property, that Ms. Davies was using it for drainage, and that it had  
7 provided drainage for the Davies (Hayfields') property for more than 50 years.  
8 Further, a survey of the boundary line performed by Apex in 2009 gave Mr.  
9 Ruffier specific knowledge by that year that the drain pipe did indeed cross  
10 the property boundary line, and it runs underneath the Ruffiers' property near  
11 the boundary.  
12

13 20. The Hayfields (successor owners to Davies) had no knowledge of  
14 the drainage pipe. Therefore, even if Ruffier had notified them of his intended  
15 excavation, Hayfields would not have taken action to prevent the excavation  
16 or attempt to locate the pipe since they weren't aware of its existence. This  
17 duty fell on Defendant Ruffiers based on their superior knowledge from the  
18 exchanges with Davies in the late 1990's  
19

20 21. Defendant Ruffier's failure to locate the drainage pipe prior to his  
21 excavation activities in 2011 was negligent. A person exercising reasonable  
22 care would have attempted to locate and avoid crushing the drainage pipe.  
23  
24  
25

The resulting damage to the pipe and flooding of Plaintiffs' basement was a foreseeable consequence of Defendant's actions.

22. As a direct result of the water infiltration into their basement in February and March 2011, the Plaintiffs Incurred the following damages:

❖ Pump rental (United Rentals)	\$ 106.12
❖ Robison Plumbing (Diagnosis)	\$ 1,268.38
❖ Rainbow Remediation	\$ 5,677.39
❖ Pump Fees	\$ 44.47
❖ Underground Leak Detection Services – Leak Detector	\$ 250.00
❖ Robison Plumbing – Estimate to replace water heater	\$ 1,730.00
❖ Dana's Heating and Cooling – Replace Aquastat	\$ 726.38
❖ Personal Property Damage TV, Bose speakers, outdoor speakers, stereo receiver, couch, bed, dresser, desk, deck cushions, coffee table, framed photos, rugs, luggage, artwork, Christmas decorations, bedding, lamps, camera, surround sound system, computer, nightstand, books, craft supplies, vacuum, shop-vac, piano, guitar, portable speakers.	\$ 8,450.00

❖ Estimate for basement repair

\$ 77,326.00  
\$ 95,578.74

**CONCLUSIONS OF LAW**

1. Mr. Ruffier was an "excavator" as defined by RCW 19.122.020(6) when he performed stump removal work on the Ruffiers' property in February 2011.

2. Mr. Ruffiers' stump removal work on the Ruffiers' property in February 2011 was an "excavation" as defined by RCW 19.122.020(4).

3. In February 2011 the drain pipe that is the subject of this lawsuit was an "underground facility" as defined by RCW 19.122.020(22).

4. Mr. Ruffier had a duty to exercise reasonable care to avoid damaging the drain pipe.

5. Damaging the drain pipe was a foreseeable risk when in February 2011 Mr. Ruffier dug a tree stump out of the ground with a backhoe in an area that he knew the drain pipe was located. Mr. Ruffier therefore had a duty to exercise reasonable care to avoid damaging the drain pipe.

6. Mr. Ruffier breached his duty to exercise reasonable care to avoid damaging the drain pipe because he failed to take any steps to identify the location of the drain pipe before using a backhoe to dig out a tree stump in an area he knew the drain pipe was located.

7. The Hayfields are entitled to an Order granting them a Judgment against the Ruffiers for their actual damages in the amount of \$95,578.74



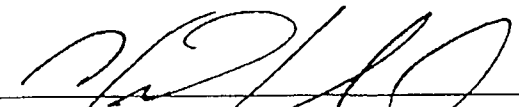
8. Although Defendant technically violated the terms of RCW 19.122.040, notice to Plaintiffs of the excavation and/or calls to "811" would not have prevented the damage that occurred. Therefore, although Defendant is liable for common law negligence to Plaintiffs for their damages, Plaintiffs are not entitled to recover their attorney's fees per RCW 19.122 040(4).

DONE IN OPEN COURT this 26 day of July, 2013.

  
JUDGE SUSAN K. SERKO

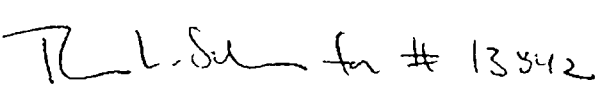
Presented by:

ROBERTS JOHNS & HEMPHILL, PLLC

  
Mark R. Roberts, WSBA No. 18811  
Michael M.K. Hemphill, WSBA No. 27340  
Attorneys for Plaintiffs

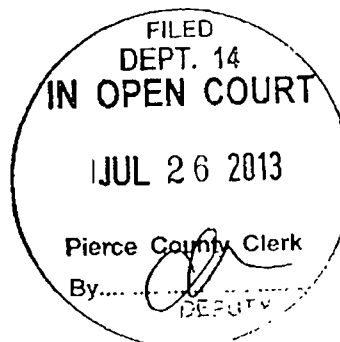
Copy received; Approved as to Form:

WIECK SCHWANZ, PLLC

  
David J. Wieck, WSBA No. 16656  
Attorneys for Defendants

AMENDED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
Page 12

ROBERTS JOHNS & HEMPHILL, PLLC  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8646



# APPENDIX B



11-2-15350-4 40946492 JD 07-29-13

The Honorable Susan K. Serko

DEPT. 14

IN OPEN COURT

JUL 26 2013

Pierce County Clerk

By.....  
DEPUTY

IN THE SUPERIOR COURT, STATE OF WASHINGTON  
FOR PIERCE COUNTY

BRETT HAYFIELD and KATHY DAVIS-  
HAYFIELD, husband and wife,

Plaintiffs,

vs.

BEATRIX RUFFIER and ROBERT  
RUFFIER, husband and wife,

Defendants.

No. 11-2-15350-4

**AMENDED**

JUDGMENT AND ORDER

Proposed

**JUDGMENT SUMMARY**

1. Judgment Creditor: Brett Hayfield and Kathy Davis-Hayfield
2. Judgment Debtor: Robert Ruffier and Beatrix Ruffier
3. Principal Judgment Amount: \$95,578.74
4. Interest: N/A
5. Attorney Fees: N/A
6. Costs: N/A
7. Other Recovery Amounts: N/A
8. Interest Rate of Judgment: 12% per annum
9. Attorney for Judgment Creditor: Michael Hemphill
10. Attorney for Judgment Debtor: David Wieck

JUDGMENT AND ORDER -- 1

WIECK SCHWANZ, PLLC  
400 112<sup>th</sup> Ave. NE, Suite 340  
Bellevue, Washington 98004  
425-454-4455 / Fax 425-454-4457

THIS MATTER having come on before the above-entitled Court following trial on April 22, 2013, and concluding on May 9, 2013, and the parties appearing in person and by and through their attorneys Michael M. K. Hemphill for the Plaintiffs and David J. Wieck for the Defendants; and the Court having heretofore entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises; Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

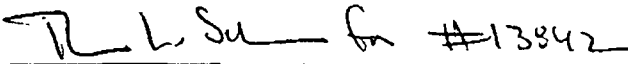
1. Brett Hayfield and Kathy Davis-Hayfield are awarded Judgment against Robert Ruffier and Beatrix Ruffier, in the principal amount of \$95,578.74. It is further

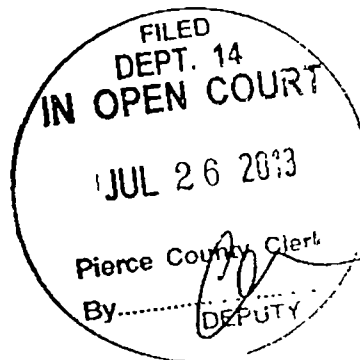
ORDERED, ADJUDGED AND DECREED that Plaintiffs' request for attorney's fees is denied.

DATED this 26 day of July, 2013.

  
JUDGE SUSAN K. SERKO

Presented By:

  
DAVID J. WIECK WSBA #16656  
Attorney for Defendants



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of 18, competent to testify, not a party to this action, and employed by the firm of Wieck Schwanz, PLLC.

On the date set forth below, I served the document(s) to which this is attached, in the manner noted, on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Mark R. Roberts Roberts Johns Hemphill 7525 Pioneer Way, Suite 202 Gig Harbor, WA 98335 <a href="mailto:mark@rjh-legal.com">mark@rjh-legal.com</a>	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile, 253-858-8646 <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Electronic Mail
	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail

SIGNED at Bellevue, Washington, this \_\_\_\_ day of July, 2013.

\_\_\_\_\_  
MACHELE M. BRODIE

# APPENDIX C

instituted within one year after the final judgment or order in such proceedings: PROVIDED, That said limitation of actions shall in any case toll the law so long as there is actual concealment on the part of the person. [1986 c 320 § 11.]

**19.120.110 Civil actions by retailers—Attorneys' fees.** Any motor fuel retailer who is injured in his or her business by the commission of any act prohibited by this chapter, or any motor fuel retailer injured because of his or her refusal to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including reasonable attorneys' fees. [1986 c 320 § 12.]

**19.120.120 Civil actions by attorney general—Attorneys' fees—Criminal actions not limited by chapter.** (1) The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful. The prevailing party may in the discretion of the court recover the costs of such action including a reasonable attorneys' fee.

(2) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law. [1986 c 320 § 13.]

**19.120.130 Exception or exemption—Burden of proof—Waiver of provisions of chapter void.** In any proceeding under this chapter, the burden of proving an exception or an exemption from definition is upon the person claiming it. Any condition, stipulation or provision purporting to bind any person acquiring a motor fuel franchise at the time of entering into a motor fuel franchise or other agreement to waive compliance with any provision of this chapter, any rule or order hereunder is void. [1986 c 320 § 14.]

**19.120.900 Short title.** This chapter shall be known as the "gasoline dealer bill of rights act." [1986 c 320 § 19.]

**19.120.901 Application of chapter.** The provisions of this chapter apply to any motor fuel franchise or contract entered into or renewed on or after June 30, 1986, between a motor fuel refiner-supplier and a motor fuel retailer. [1986 c 320 § 15.]

**19.120.902 Intent—Interpretation consistent with chapter 19.100 RCW.** It is the intent of the legislature that this chapter be interpreted consistent with chapter 19.100 RCW. [1986 c 320 § 17.]

**19.120.903 Liberal construction.** This chapter shall be liberally construed to effectuate its beneficial purposes. [1986 c 320 § 18.]

**19.120.904 Severability—1986 c 320.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1986 c 320 § 22.]

**19.120.905 Effective date—1986 c 320:** (1) Sections 20 and 21 are necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions and shall take effect immediately.

(2) Sections 1 through 19, 22 and 23 of this act shall take effect June 30, 1986. [1986 c 320 § 24.]

## Chapter 19.122 RCW

### UNDERGROUND UTILITIES

#### Sections

19.122.010	Intent.
19.122.020	Definitions.
19.122.027	One-number locator services—Single statewide toll-free telephone number.
19.122.030	Notice of excavation to owners of underground facilities—One-number locator service—Time for notice—Marking of underground facilities—Costs.
19.122.033	Notice of excavation to pipeline companies.
19.122.035	Pipeline company duties after notice of excavation—Examination—Information of damage—Notification of local first responders.
19.122.040	Underground facilities identified in bid or contract—Excavator's duty of reasonable care—Liability for damages—Attorneys' fees.
19.122.045	Exemption from liability.
19.122.050	Damage to underground facility—Notification by excavator—Repairs or relocation of facility.
19.122.055	Failure to notify one-number locator service—Civil penalty, if damages.
19.122.060	Exemption from notice and marking requirements for property owners.
19.122.070	Civil penalties—Treble damages—Existing remedies not affected.
19.122.075	Damage or removal of permanent marking—Civil penalty.
19.122.080	Waiver of notification and marking requirements.
19.122.090	Excavation without a valid excavation confirmation code—Penalty.
19.122.100	Violation of RCW 19.122.090—Affirmative defense.
19.122.110	False excavation confirmation code—Penalty.
19.122.120	One-number locator service to provide excavation confirmation code.
19.122.900	Severability—1984 c 144.

**19.122.010 Intent.** It is the intent of the legislature in enacting this chapter to assign responsibilities for locating and keeping accurate records of utility locations, protecting and repairing damage to existing underground facilities, and protecting the public health and safety from interruption in utility services caused by damage to existing underground utility facilities. [1984 c 144 § 1.]

**19.122.020 Definitions.** Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

(1) "Business day" means any day other than Saturday, Sunday, or a legal local, state, or federal holiday.

(2) "Damage" includes the substantial weakening of structural or lateral support of an underground facility, penetration, impairment, or destruction of any underground protective coating, housing, or other protective device, or the severance, partial or complete, of any underground facility to the extent that the project owner or the affected utility owner determines that repairs are required.

(3) "Emergency" means any condition constituting a clear and present danger to life or property, or a customer service outage.

(4) "Excavation" means any operation in which earth, rock, or other material on or below the ground is moved or otherwise displaced by any means, except the tilling of soil less than twelve inches in depth for agricultural purposes, or road and ditch maintenance that does not change the original road grade or ditch flowline.

(5) "Excavation confirmation code" means a code or ticket issued by the one-number locator service for the site where an excavation is planned. The code must be accompanied by the date and time it was issued.

(6) "Excavator" means any person who engages directly in excavation.

(7) "Gas" means natural gas, flammable gas, or toxic or corrosive gas.

(8) "Hazardous liquid" means: (a) Petroleum, petroleum products, or anhydrous ammonia as those terms are defined in 49 C.F.R. Part 195 as in effect on March 1, 1998; and (b) carbon dioxide. The utilities and transportation commission may by rule incorporate by reference other substances designated as hazardous by the secretary of transportation.

(9) "Identified facility" means any underground facility which is indicated in the project plans as being located within the area of proposed excavation.

(10) "Identified but unlocatable underground facility" means an underground facility which has been identified but cannot be located with reasonable accuracy.

(11) "Locatable underground facility" means an underground facility which can be field-marked with reasonable accuracy.

(12) "Marking" means the use of stakes, paint, or other clearly identifiable materials to show the field location of underground facilities, in accordance with the current color code standard of the American public works association. Markings shall include identification letters indicating the specific type of the underground facility.

(13) "Notice" or "notify" means contact in person or by telephone or other electronic methods that results in the receipt of a valid excavation confirmation code.

(14) "One-number locator service" means a service through which a person can notify utilities and request field-marking of underground facilities.

(15) "Operator" means the individual conducting the excavation.

(16) "Person" means an individual, partnership, franchise holder, association, corporation, a state, a city, a county, or any subdivision or instrumentality of a state, and its employees, agents, or legal representatives.

(17) "Pipeline" or "pipeline system" means all or parts of a pipeline facility through which hazardous liquid or gas moves in transportation, including, but not limited to, line pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping or compressor units, metering and delivery stations and fabricated assemblies therein, and breakout tanks. "Pipeline" or "pipeline system" does not include process or transfer pipelines.

(18) "Pipeline company" means a person or entity constructing, owning, or operating a pipeline for transporting hazardous liquid or gas. A pipeline company does not include: (a) Distribution systems owned and operated under franchise for the sale, delivery, or distribution of natural gas

at retail; or (b) excavation contractors or other contractors that contract with a pipeline company.

(19) "Reasonable accuracy" means location within twenty-four inches of the outside dimensions of both sides of an underground facility.

(20) "Transfer pipeline" means a buried or aboveground pipeline used to carry hazardous liquid between a tank vessel or transmission pipeline and the first valve inside secondary containment at the facility provided that any discharge on the facility side of that first valve will not directly impact waters of the state. A transfer pipeline includes valves, and other appurtenances connected to the pipeline, pumping units, and fabricated assemblies associated with pumping units. A transfer pipeline does not include process pipelines, pipelines carrying ballast or bilge water, transmission pipelines, or tank vessel or storage tanks.

(21) "Transmission pipeline" means a pipeline that transports hazardous liquid or gas within a storage field, or transports hazardous liquid or gas from an interstate pipeline or storage facility to a distribution main or a large volume hazardous liquid or gas user, or operates at a hoop stress of twenty percent or more of the specified minimum yield strength.

(22) "Underground facility" means any item buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances and including but not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, and those parts of poles or anchors below ground. This definition does not include pipelines as defined in subsection (17) of this section, but does include distribution systems owned and operated under franchise for the sale, delivery, or distribution of natural gas at retail. [2007 c 142 § 9; 2005 c 448 § 1; 2000 c 191 § 15; 1984 c 144 § 2.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.027 One-number locator services—Single statewide toll-free telephone number.** (1) The utilities and transportation commission shall cause to be established a single statewide toll-free telephone number to be used for referring excavators to the appropriate one-number locator service.

(2) The utilities and transportation commission, in consultation with the Washington utilities coordinating council, shall establish minimum standards and best management practices for one-number locator services.

(3) One-number locator services shall be operated by nongovernmental agencies. [2005 c 448 § 2; 2000 c 191 § 16.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.030 Notice of excavation to owners of underground facilities—One-number locator service—Time for notice—Marking of underground facilities—Costs:** (1) Before commencing any excavation, excluding agricultural



ture tilling less than twelve inches in depth, the excavator shall provide notice of the scheduled commencement of excavation to all owners of underground facilities through a one-number locator service.

(2) All owners of underground facilities within a one-number locator service area shall subscribe to the service. One-number locator service rates for cable television companies will be based on the amount of their underground facilities. If no one-number locator service is available, notice shall be provided individually to those owners of underground facilities known to or suspected of having underground facilities within the area of proposed excavation. The notice shall be communicated to the owners of underground facilities not less than two business days or more than ten business days before the scheduled date for commencement of excavation, unless otherwise agreed by the parties.

(3) Upon receipt of the notice provided for in this section, the owner of the underground facility shall provide the excavator with reasonably accurate information as to its locatable underground facilities by surface-marking the location of the facilities. If there are identified but unlocatable underground facilities, the owner of such facilities shall provide the excavator with the best available information as to their locations. The owner of the underground facility providing the information shall respond no later than two business days after the receipt of the notice, or before the excavation time, at the option of the owner, unless otherwise agreed by the parties. Excavators shall not excavate until all known facilities have been marked. Once marked by the owner of the underground facility, the excavator is responsible for maintaining the markings. Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this section.

(4) The owner of the underground facility shall have the right to receive compensation for costs incurred in responding to excavation notices given less than two business days prior to the excavation from the excavator.

(5) An owner of underground facilities is not required to indicate the presence of existing service laterals or appurtenances if the presence of existing service laterals or appurtenances on the site of the construction project can be determined from the presence of other visible facilities, such as buildings, manholes, or meter and junction boxes on or adjacent to the construction site.

(6) Emergency excavations are exempt from the time requirements for notification provided in this section.

(7) If the excavator, while performing the contract, discovers underground facilities which are not identified, the excavator shall cease excavating in the vicinity of the facility and immediately notify the owner or operator of such facilities, or the one-number locator service. [2000 c 191 § 17; 1988 c 99 § 1; 1984 c 144 § 3.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

*Damages to facilities on state highways:* RCW 47.44.150.

**19.122.033 Notice of excavation to pipeline companies.** (1) Before commencing any excavation, excluding (2008 Ed.)

agricultural tilling less than twelve inches in depth, an excavator shall notify pipeline companies of the scheduled commencement of excavation through a one-number locator service in the same manner as is required for notifying owners of underground facilities of excavation work under RCW 19.122.030. Pipeline companies shall have the same rights and responsibilities as owners of underground facilities under RCW 19.122.030 regarding excavation work. Excavators have the same rights and responsibilities under this section as they have under RCW 19.122.030.

(2) Project owners, excavators, and pipeline companies have the same rights and responsibilities relating to excavation near pipelines that they have for excavation near underground facilities as provided in RCW 19.122.040. [2000 c 191 § 18.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.035 Pipeline company duties after notice of excavation—Examination—Information of damage—Notification of local first responders.** (1) After a pipeline company has been notified by an excavator pursuant to RCW 19.122.033 that excavation work will uncover any portion of the pipeline, the pipeline company shall ensure that the pipeline section in the vicinity of the excavation is examined for damage prior to being reburied.

(2) Immediately upon receiving information of third-party damage to a hazardous liquid pipeline, the company that operates the pipeline shall terminate the flow of hazardous liquid in that pipeline until it has visually inspected the pipeline. After visual inspection, the operator of the hazardous liquid pipeline shall determine whether the damaged pipeline section should be replaced or repaired, or whether it is safe to resume pipeline operation. Immediately upon receiving information of third-party damage to a gas pipeline, the company that operates the pipeline shall conduct a visual inspection of the pipeline to determine whether the flow of gas through that pipeline should be terminated, and whether the damaged pipeline should be replaced or repaired. A record of the pipeline company's inspection report and test results shall be provided to the utilities and transportation commission consistent with reporting requirements under 49 C.F.R. 195 Subpart B.

(3) Pipeline companies shall immediately notify local first responders and the department of any reportable release of a hazardous liquid from a pipeline. Pipeline companies shall immediately notify local first responders and the commission of any blowing gas leak from a gas pipeline that has ignited or represents a probable hazard to persons or property. Pipeline companies shall take all appropriate steps to ensure the public safety in the event of a release of hazardous liquid or gas under this subsection.

(4) No damaged pipeline may be buried until it is repaired or relocated. The pipeline company shall arrange for repairs or relocation of a damaged pipeline as soon as is practical or may permit the excavator to do necessary repairs or relocation at a mutually acceptable price. [2000 c 191 § 19.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.040 Underground facilities identified in bid or contract—Excavator's duty of reasonable care—Liability for damages—Attorneys' fees.** (1) Project owners shall indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation. The following shall be deemed changed or differing site conditions:

(a) An underground facility not identified as required by this chapter or other provision of law; and

(b) An underground facility not located, as required by this chapter or other provision of law, by the project owner or excavator if the project owner or excavator is also a utility.

(2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator shall:

(a) Determine the precise location of underground facilities which have been marked;

(b) Plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and

(c) Provide such support for underground facilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such facilities.

(3) If an underground facility is damaged and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation shall be liable for any damages. Any clause in an excavation contract which attempts to allocate liability, or requires indemnification to shift the economic consequences of liability, different from the provisions of this chapter is against public policy and unenforceable. Nothing in this chapter prevents the parties to an excavation contract from contracting with respect to the allocation of risk for changed or differing site conditions.

(4) In any action brought under this section, the prevailing party is entitled to reasonable attorneys' fees. [1984 c 144 § 4.]

**19.122.045 Exemption from liability.** Excavators who comply with the requirements of this chapter are not liable for any damages arising from contact or damage to an underground fiber optics facility other than the cost to repair the facility. [1988 c 99 § 2.]

**19.122.050 Damage to underground facility—Notification by excavator—Repairs or relocation of facility.** (1) An excavator who, in the course of excavation, contacts or damages an underground facility shall notify the utility owning or operating such facility and the one-number locator service. If the damage causes an emergency condition, the excavator causing the damage shall also alert the appropriate local public safety agencies and take all appropriate steps to ensure the public safety. No damaged underground facility may be buried until it is repaired or relocated.

(2) The owner of the underground facilities damaged shall arrange for repairs or relocation as soon as is practical or may permit the excavator to do necessary repairs or relocation at a mutually acceptable price. [1984 c 144 § 5.]

**19.122.055 Failure to notify one-number locator service—Civil penalty, if damages.** (1)(a) Any excavator who

fails to notify the one-number locator service and causes damage to a hazardous liquid or gas pipeline is subject to a civil penalty of not more than ten thousand dollars for each violation.

(b) The civil penalty in this subsection may also be imposed on any excavator who violates RCW 19.122.090.

(2) All civil penalties recovered under this section shall be deposited into the pipeline safety account created in RCW 81.88.050. [2005 c 448 § 3; 2001 c 238 § 5; 2000 c 191 § 24.]

**Intent—Finding—Effective date—2001 c 238:** See notes following RCW 80.24.060.

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.060 Exemption from notice and marking requirements for property owners.** An excavation of less than twelve inches in vertical depth on private noncommercial property shall be exempt from the requirements of RCW 19.122.030, if the excavation is being performed by the person or an employee of the person who owns or occupies the property on which the excavation is being performed. [1984 c 144 § 6.]

**19.122.070 Civil penalties—Treble damages—Existing remedies not affected.** (1) Any person who violates any provision of this chapter not amounting to a violation of RCW 19.122.055, and which violation results in damage to underground facilities, is subject to a civil penalty of not more than one thousand dollars for each violation. All penalties recovered in such actions shall be deposited in the general fund.

(2) Any excavator who willfully or maliciously damages a field-marked underground facility shall be liable for treble the costs incurred in repairing or relocating the facility. In those cases in which an excavator fails to notify known underground facility owners or the one-number locator service, any damage to the underground facility shall be deemed willful and malicious and shall be subject to treble damages for costs incurred in repairing or relocating the facility.

(3) This chapter does not affect any civil remedies for personal injury or for property damage, including that to underground facilities, nor does this chapter create any new civil remedies for such damage. [2005 c 448 § 4; 1984 c 144 § 7.]

*Damages to facilities on state highways: RCW 47.44.150.*

**19.122.075 Damage or removal of permanent marking—Civil penalty.** Any person who willfully damages or removes a permanent marking used to identify an underground facility or pipeline, or a temporary marking prior to its intended use, is subject to a civil penalty of not more than one thousand dollars for each act. [2000 c 191 § 23.]

**Intent—Findings—Conflict with federal requirements—Short title—Effective date—2000 c 191:** See RCW 81.88.005 and 81.88.900 through 81.88.902.

**19.122.080 Waiver of notification and marking requirements.** The notification and marking provisions of this chapter may be waived for one or more designated persons by an underground facility owner with respect to all or

part of that underground facility owner's own underground facilities. [1984 c 144 § 8.]

**19.122.090 Excavation without a valid excavation confirmation code—Penalty.** Any excavator who excavates, without a valid excavation confirmation code when required under this chapter, within thirty-five feet of a transmission pipeline is guilty of a misdemeanor. [2005 c 448 § 5.]

**19.122.100 Violation of RCW 19.122.090—Affirmative defense.** If charged with a violation of RCW 19.122.090, an operator will be deemed to have established an affirmative defense to such charges if:

(1) The operator was provided a valid excavation confirmation code;

(2) The excavation was performed in an emergency situation;

(3) The operator was provided a false confirmation code by an identifiable third party; or

(4) Notice of the excavation was not required under this chapter. [2005 c 448 § 6.]

**19.122.110 False excavation confirmation code—Penalty.** Any person who intentionally provides an operator with a false excavation confirmation code is guilty of a misdemeanor. [2005 c 448 § 7.]

**19.122.120 One-number locator service to provide excavation confirmation code.** Upon receipt, during normal business hours, of notice of an intended excavation, the one-number locator service shall provide an excavation confirmation code. [2005 c 448 § 8.]

**19.122.900 Severability—1984 c 144.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1984 c 144 § 9.]

## Chapter 19.126 RCW

### WHOLESALE DISTRIBUTORS AND SUPPLIERS OF MALT BEVERAGES

(Formerly: Wholesale distributors and suppliers of wine and malt beverages)

#### Sections

19.126.010	Purpose.
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19.126.080	Civil actions—Injunctive relief.
19.126.900	Short title.
19.126.901	Severability—1984 c 169.

**19.126.010 Purpose.** (1) The legislature recognizes that both suppliers and wholesale distributors of malt beverages are interested in the goal of best serving the public interest through the fair, efficient, and competitive distribution of

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such beverages. The legislature encourages them to achieve this goal by:

(a) Assuring the wholesale distributor's freedom to manage the business enterprise, including the wholesale distributor's right to independently establish its selling prices; and

(b) Assuring the supplier and the public of service from wholesale distributors who will devote their best competitive efforts and resources to sales and distribution of the supplier's products which the wholesale distributor has been granted the right to sell and distribute.

(2) This chapter governs the relationship between suppliers of malt beverages and their wholesale distributors to the full extent consistent with the Constitution and laws of this state and of the United States. [2003 c 59 § 1; 1984 c 169 § 1.]

**Effective date—2003 c 59:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2003]." [2003 c 59 § 3.]

**19.126.020 Definitions.** The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agreement of distributorship" means any contract, agreement, commercial relationship, license, association, or any other arrangement, for a definite or indefinite period, between a supplier and distributor.

(2) "Distributor" means any person, including but not limited to a component of a supplier's distribution system constituted as an independent business, importing or causing to be imported into this state, or purchasing or causing to be purchased within this state, any malt beverage for sale or resale to retailers licensed under the laws of this state, regardless of whether the business of such person is conducted under the terms of any agreement with a malt beverage manufacturer.

(3) "Supplier" means any malt beverage manufacturer or importer who enters into or is a party to any agreement of distributorship with a wholesale distributor. "Supplier" does not include: (a) Any domestic brewery or microbrewery licensed under RCW 66.24.240 and producing less than fifty thousand barrels of malt liquor annually; (b) any brewer or manufacturer of malt liquor producing less than fifty thousand barrels of malt liquor annually and holding a certificate of approval issued under RCW 66.24.270; or (c) any authorized representative of malt liquor manufacturers who holds an appointment from one or more malt liquor manufacturers which, in the aggregate, produce less than fifty thousand barrels of malt liquor.

(4) "Malt beverage manufacturer" means every brewer, fermenter, processor, bottler, or packager of malt beverages located within or outside this state, or any other person, whether located within or outside this state, who enters into an agreement of distributorship for the resale of malt beverages in this state with any wholesale distributor doing business in the state of Washington.

(5) "Importer" means any distributor importing beer into this state for sale to retailer accounts or for sale to other distributors designated as "subjobbers" for resale.

(6) "Authorized representative" has the same meaning as "authorized representative" as defined in RCW 66.04.010.